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October 11, 1999

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Magalia Roman Salas, Secretary
Office of the Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
TW-A325
Washington, DC 20554

Re: WT Docket No. 99-217

Dear Secretary Salas:

Enclosed for filing in the above-referenced docket are the original and four copies of the Comments of the Florida Telecommunications Industry Association, Inc. A copy of these Comments is being filed with the Commission's copy contractor.

Sincerely,

J. Jeffry Wahlen

JJW/jh
Enclosures
cc: International Transcription Services, Inc.
445 Twelfth Street, S.W.
Room CY-B402
Washington, DC 20554

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Promotion of Competitive Networks
in Local Telecommunications Markets

WT Docket No. 99-217

/

COMMENTS OF THE FLORIDA TELECOMMUNICATIONS INDUSTRY ASSOCIATION, INC.

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Florida Telecommunications Industry Association, Inc.
October 12, 1999

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Promotion of Competitive Networks in Local Telecommunications Markets

WT Docket No. 99-217

_____/

Comments of the Florida Telecommunications Industry Association, Inc.

Pursuant to 47 C.F.R. §§ 1.415 and 1.419, the Florida Telecommunications Industry Association, Inc. submits the following comments regarding local rights-of-way management as it affects telecommunications service providers.

Summary of Argument

The manner in which local governments manage access to public rights-of-way has a significant impact on the development of facilities-based local competition. The FCC should encourage states to follow Florida's lead by adopting strong standards consistent with the Telecommunications Act's limitation on the scope of local government control over the use of public rights-of-way by wireline and wireless telecommunications carriers. To help telecommunications carriers as they interact with local governments, the FCC should expressly affirm that Section 253(c) of the Telecommunications Act of 1996 is a limitation on the powers of local governments to manage rights-of-way and does not grant local governments powers over rights-of-way over and above the powers local governments have under state law. In addition,

the FCC should state that excessive rights-of-way fees, burdensome application processes and unreasonable bond and security fund requirements are among the kinds of things that constitute barriers to entry and are illegal under the 1996 Act.

Introduction

1. By Order No. 99-141, adopted June 10, 1999 ("Notice"), the Federal Communications Commission ("FCC") issued a Notice of Inquiry seeking comments from service providers and State and local governments regarding their rights-of-way management experiences. The announced purpose of the inquiry is to compile a record regarding local rights-of-way management as it affects telecommunications providers. Notice at ¶ 79. The Notice identifies Florida as a state that has enacted standards governing the requirements that local governments may impose on telecommunications rights-of-way users. Notice at ¶ 79, n. 201 citing Fla. Stat. § 337.401. The Notice specifically invites comments on the success of these standards.

2. The Florida Telecommunications Industry Association ("FTIA" or "Association") was established in 1907, and is a trade association that advocates the interests of Florida's telecommunications companies. Members include over 18 incumbent and competitive local exchange telecommunications providers and long distance and wireless providers. The Association's mission is to represent its members before governmental agencies and to promote the interests of the telecommunications industry on issues important to telecommunications providers.

3. The FTIA has participated with local and State government entities on discussions of rights-of-way management issues, and actively worked with local governments, their representatives and the Florida Legislature on the 1998 legislative amendments to Section 337.401, Florida Statutes (1997), which contains the standards for rights-of-way management by local governments. These comments reflect the observations and experiences of the wireline and wireless members of the FTIA on right-of-way management issues.

Florida's Statutory Framework

4. The Notice correctly states that Florida has adopted standards governing the requirements that local governments may impose on telecommunications rights-of-way users; however, the Notice did not identify all of the relevant statutes. Florida has long recognized the benefits of a ubiquitous telecommunications network and has adopted a series of statutes that foster the statewide development of telecommunications networks and services. These statutes reflect Florida's strong tradition of telecommunications regulation at the state level.

5. The cornerstone of the State's efforts to promote deployment of telecommunications networks is a statute that grants telecommunications companies[1] the right to install facilities in public road rights-of-way. As early as 1903 the Florida Legislature enacted a statute that granted telegraph and telephone companies an express right to place poles, lines and other facilities on or beside any public road or highway. See 1903 Laws of Florida, Ch. 5262, s.1. The modern equivalent of this early law is codified in Section 362.01, Florida Statutes, which reads:

[1] Under Florida law, and as used herein, the term "telecommunications company" excludes wireless carriers. See §364.02(12), Fla. Stat.

> Any telegraph or telephone company chartered by this or another state, or any individual operating or desiring to operate a telegraph or telephone line, or lines, in this state, may erect posts, wires and other fixtures for telegraph or telephone purposes on or beside any public road or highway; provided, however, that the same shall not be set so as to obstruct or interfere with the common uses of said roads or highways. Permission to occupy the streets of an incorporated city or town must first be obtained from the city or town council.

6. This almost century old law was first enacted when the telephone industry was in its infancy and was intended as an incentive to facilitate the efficient deployment of telephone facilities throughout the State. Wireline telecommunications companies relied on this statute over the years to build their networks. The FTIA and its member companies are hopeful that this statute will continue to help promote facilities based competition in Florida's emerging competitive local service market.

7. The second piece of the puzzle is a series of statutes that place the regulation of wireline intrastate telecommunications services at the state level through an agency with statewide regulatory authority. What is now known as the Florida Public Service Commission ("FPSC") was established in the early 1900's and was given near plenary regulatory authority, subject to narrow limitations, over providers of telecommunications services in Florida. The FPSC's jurisdiction is defined in Chapter 364, Florida Statutes, and includes authority over certification of telecommunication companies statewide, as well as the rates, operations, services offered and service quality of telecommunications companies operating in Florida. Chapter 364, Florida Statutes, was amended in 1995 to allow local exchange competition and replace traditional rate of return regulation with "price" regulation. Section 364.01(2), Florida Statutes,

expressly preempts local government ordinances that intrude on the regulatory authority of the FPSC. This preemption serves to prevent the confusion and inefficiencies that would result if all of Florida's 67 counties and more than 400 municipalities enacted their own regulations governing the telecommunications companies operating in their jurisdiction.

8. While the FPSC has significant authority over the intrastate operations of wireline telecommunications companies operating in Florida, the State has recognized that the management of local public roads and rights-of-way is a matter of local concern.[2] However, while the State deferred to its local subdivisions on certain rights-of-way management issues, that deferral is not without important limitations. When Chapter 364 was amended in 1995 to allow local exchange competition, the Legislature took affirmative steps to ensure that local government power over rights-of-way did not interfere with the development of local competition by adopting Section 364.0361, Florida Statutes, which states:

> A local government shall treat each telecommunications company in a nondiscriminatory manner when exercising its authority to grant franchises to a telecommunications company or to otherwise establish conditions or compensation for the use of rights-of-way or other public property by a telecommunications company.

Section 364.0361, Florida Statutes, limits local government power over rights-of-way and is similar to Section 253(c) of the 1996 Act.

9. Finally, as indicated in the Notice, Florida has also seen fit to adopt statewide standards governing local government regulation of rights-of-way use by telecommunications

[2] Section 364.01(2), Florida Statutes, states: "The provisions of this chapter shall not affect the authority and powers granted in ... s. 337.401."

companies. See Fla. Stat. §§ 337.401(3)-(9) These standards, which are part of the statewide provisions governing local government regulation of rights-of-way by all utilities, generally provide as follows:

a. Local governments may prescribe and enforce reasonable rules and regulations regarding the placement and maintenance of telecommunications and other utility facilities with road rights-of-way. Fla.Stat. § 337.401(1).

b. Local governments may grant authority to use the rights-of-way for utility purposes subject to the reasonable rules and regulations adopted by the local government. Fla.Stat. § 337.401(2).

c. Facilities may not be placed in the rights-of-way without a written permit issued by the local government. Fla.Stat. § 337.401(2).

d. Permit holders are responsible for any damage resulting from the issuance of the permits or the installation, inspection or repair of facilities located within the rights-of-way. Fla.Stat §§ 337.401(2) and 337.402.

e. Subject to certain conditions, permit holders must remove or relocate their facilities at their expense if those facilities unreasonably interfere with the safe use of the roads or the maintenance, improvement, extension or expansion of the roads. Fla.Stat. § 337.403.

10. These general standards include special provisions governing the requirements that local governments may impose on telecommunications rights-of-way users. See Fla.Stat. § 337.401(3)-(9). These special standards:

a. limit the fees that can be assessed on local and toll service providers by cities in exchange for permission to occupy or that are in any way related to rights-of-way; Fla.Stat. § 337.401(3) & (5)

b. preclude cities from imposing taxes, fees or other charges for the right to operate within the city; Fla.Stat. § 337.401(5)

c. prohibit cities from soliciting or requiring in-kind compensation in lieu of any fees allowed under the guidelines; Fla.Stat. § 337.401(5)

d. prevent local government entities from using their authority over the placement of facilities in rights-of-way as a basis for asserting or exercising general regulatory control over a telecommunications company; Fla.Stat. § 337.401(6), and

e. limit the ability of municipalities to require additional consent to continue lawful occupation of the rights-of-ways. Fla.Stat. § 337.401(7).[3]

11. These state standards generally have well served the wireline telecommunications industry, local governments and the public by clearly limiting the extent of local government power over rights-of-way. They also help provide certainty to telecommunications companies hoping to enter a local market by broadly outlining the terms under which rights-of-way will be available for network deployment. However, while the standards seem clear and unambiguous,

[3] The provisions outlined in paragraphs b, c, d and e above were added to Section 337.401, Florida Statutes, in 1998 in response to the experiences of telecommunications companies after local competition was authorized. Those experiences are summarized in the following section.

telecommunications companies continue to be confronted with a number of enterprising consultants and local governments, who insist on testing the limits of local government authority over telecommunications companies. These "tests" interject uncertainty and time delay into the market entry process, cause local governments and telecommunications companies to spend thousands of dollars arguing or litigating the terms of rights-of-way ordinances and serve to impose significant costs on new entrants seeking to deploy their networks in public rights-of-way. Whatever the FCC can do to clarify the role of local governments under the 1996 Act regarding rights-of-way management issues will bring needed certainty to an area that has become increasingly difficult for telecommunications companies seeking to compete in the local markets on a facilities basis.

Telecommunications Industry Experiences

12. Prior to the authorization of local competition, rights-of-way management was a non-issue for wireline telecommunications companies in Florida. Cities generally adopted short, simple "franchise" ordinances or agreements that called for the payment of fees by telecommunications companies at the statutory caps (1% of recurring local service revenue for local providers and $500 per mile for toll providers) and included simple rules and regulations governing the use of rights-of-way. The agreements or ordinances prepared by cities generally did not require performance or construction bonds and did not attempt to regulate the services offered by and rates charged by telephone companies. Many municipal ordinances or agreements refrained from doing much other than imposing the statutorily allowed fees and

requiring payment. Counties in general showed little interest in adopting "franchise" ordinances or requiring franchise agreements for telephone companies.

13. The arrival of local competition appears to have dramatically changed the way many Florida local governments and their consultants view local government police powers and authority over rights-of-way management. Since 1996, over 60 Florida municipalities have undertaken to substantially revise or adopt new rights-of-way ordinances, and the length of the ordinances and agreements has increased from a few pages to over 50 pages in some cases. Several local governments in Florida drafted rights-of-way ordinances imposing on telecommunications companies the kind of regulatory controls local governments have historically exercised over cable television providers. For the first time in recent memory, telecommunications companies have found themselves litigating with cities over the terms of rights-of-way ordinances with two lawsuits concluded or pending at this time. This activity has been time consuming and expensive for telecommunications companies and serves to make it more expensive and difficult for telecommunications companies to enter or remain in a market. The challenges faced by telecommunications companies can be summarized into the following general categories.

14. First, some local governments apparently think or have been led to believe by consultants that the 1995 amendments to Chapter 364, Florida Statutes, and the 1996 Act resulted in a regulatory vacuum that local governments should occupy. For example, wireline telecommunications companies in Florida have been presented with draft rights-of-way ordinances that purport to give the city authority to (1) set the rates charged by the

telecommunications company for services offered within the city, and (2) have approval authority over the services to be provided by the telecommunications companies within the city.[4] Other ordinances improperly purport to grant a "right to operate" franchise within the city when telecommunications companies get their right to operate from the FPSC, i.e., Altamonte Springs, North Lauderdale, Wilton Manors, Tampa and Palm Beach. The 1998 amendments to Section 337.401(5) were intended to remind local governments that the FPSC retains jurisdiction over those aspects of telecommunications company operations and appears to have resulted in fewer ordinances with FPSC-type regulatory provisions.

15. Second, some local governments appear to believe that Section 253(c) of the 1996 Act has expanded their authority to impose fees, charges and other regulatory requirements on telecommunications companies beyond the authority they have under state law. For example, despite Section 337.401(3) and (5), Florida Statutes, which state that the 1% fee allowed to be charged by cities includes all of the fees that are in any way related to the use of the rights-of-way, the Cities of Altamonte Springs and Boca Raton have established an application process associated with the use of rights-of-way with "application" fees ranging from $2,500.00 to $5,000.00. Some cities have presented draft ordinances with application fees as high as $10,000. If a telecommunications company faced fees of this magnitude in each of Florida's over 400

[4] The fact that these provisions were not included in adopted ordinances does not mean that they were not problematic. Telecommunications companies have spent substantial resources repeatedly convincing different local governments that these types of provisions are improper and should be removed before adoption of a final ordinance.

cities and 67 counties, the application fees required before installing the first wire or pole in the rights-of-way would total over $4.6 million.

16. While the application fees are bad, they are not the only problem. The information requested by the local governments as part of the "application" process often closely resembles or is more extensive than the kind of information the FPSC requires before determining whether to certificate a telecommunications company to serve in Florida. Application fees that are clearly illegal under state law, and requirements to complete extensive "applications" serve to increase unnecessarily the transaction cost of entering the local market, can serve as a barrier to entry for telecommunications companies seeking to compete on a facilities basis, and are inconsistent with Section 253 of the 1996 Act. See AT&T Communications of the Southwest, Inc. v. City of Dallas, ____ F.Supp.2d ____, 1999 WL 324668 (N.D.Tex. 1999).

17. Other cities have been more bold and innovative with their illegal fees. Despite the clear language in Section 337.401(3), Florida Statutes, which limits the rights-of-way fee a city can impose to 1% of recurring local service revenues, Wilton Manors, and North Lauderdale have adopted ordinances that assess a 10% of gross revenues "franchise" fee for the use of the rights-of-way. The City of Altamonte Springs seeks to require incumbent LECs to pay its 1% fee on "phantom" revenues. i.e., the difference between the incumbent LEC's retail rate and the wholesale rate paid to the incumbent LEC by carriers reselling at a wholesale discount. Section 253(c) of the 1996 Act is sometimes raised by local governments as legal authority to impose these kinds of fees, which are clearly illegal under state law. Obviously, the time and expense it takes to negotiate away or litigate these provisions all serve to increase the cost of entering or

remaining in the local service market on a facilities basis. It would well serve the telecommunications industry, customers and local governments for the FCC to suggest that local governments abide by the limitations in state law where such laws themselves do not create entry barriers in violation of Section 253.

18. Third, some local governments require performance and construction bonds or security funds in amounts unrelated to the scope of the project, its probable effect on the rights-of way or the financial resources of the carrier involved. The amount of these bonds and related premiums may constitute a barrier of entry. For example, Altamonte Springs requires a $250,000 performance bond to occupy the rights-of-way and a construction bond of 110% of the cost of the project, regardless of the amount of work being performed in the rights-of-way. Broward County's recently adopted ordinance requires a fixed $100,000 performance bond. One city has proposed a $25,000 security fund and a $50,000 construction bond regardless of the size of the project. A $50,000 construction bond should not be required for a project that involves only minor disturbances of the rights-of-way, such as hand trenching or digging small holes in the dirt with shovels. If a telecommunications company installs expensive equipment in the rights-of-way with minimal disturbance of the rights-of-way, the amount of the required bond, if any, should only cover the cost of repairing the expected disturbance of the rights-of-way. Companies with adequate financial resources should not be required to post a bond or other security.

19. Fourth, local governments have seen fit to adopt a variety of other requirements on telecommunications companies that are unrelated or only remotely related to the management of

rights-of-way. For example, the City of Winter Garden's "rights-of-way" ordinance includes a requirement that carriers maintain an office for the payment of customer bills within the city. Altamonte Springs requires that telecommunications companies placing facilities in the city's rights-of-way produce to the city copies of all filings made with or papers received from the FPSC, or any other state or federal regulatory agency having jurisdiction over matters affecting construction and occupancy of the system in the rights-of-way. In a similar vein, several cities have proposed ordinances requiring telecommunications companies to send the city copies of all filings made by telecommunications companies with the FPSC, FCC or Securities and Exchange Commission that may impact the operations of the carrier. Other ordinances require carriers to participate in local "beautification" projects or include termination language that purport to require the carrier to cease providing service or sell its facilities to the government upon termination or other failure to renew the "facilities." These kinds of requirements serve little purpose other than to dissuade potential users of the rights-of-way from actually using them.

20. Another interesting approach is the use of "interim" agreements by Miami-Dade and Broward Counties. These agreements are being offered to and signed by new entrants in lieu of a duly enacted right-of-way ordinance and contemplate that a proper and legal right-of-way ordinance will be adopted in the future. However, in the meantime, the "interim" agreements contain provisions of questionable legality such as excessive bonding requirements (Broward), in-kind payment provisions (Miami-Dade), burdensome application processes (Miami-Dade) and ambiguous consumer protection provisions (Miami-Dade). Over a dozen new entrants have executed "interim" agreements containing provisions like these without challenging the

apparently illegal provisions in court, probably because the need to install facilities and get in business has made protracted litigation an unattractive option.

21. Finally, wireless providers in Florida have had their own experiences with local government management of rights-of-way. As the FCC well knows, wireless carriers are on a never ending mission to improve coverage along busy highways and commercial/industrial streets. Utility poles along these roads can be as high as 90 feet. Some wireless carriers can attach small, low power antennas that are virtually unnoticeable and meet all generally accepted windloading requirements. Unfortunately, some local governments in Florida discourage or prohibit this use for reasons unknown to the wireless carriers. Adopting an ordinance or rights-of-way regulation prohibiting or unnecessarily complicating wireless installation practices like these should be considered discriminatory and illegal under Section 253 of the 1996 Act.

Conclusion

22. The FTIA recognizes and appreciates the benefits that accrue to telecommunications carriers, local governments and the public from the Florida's statewide standards for rights-of-way and telecommunications regulation. Prior to the authorization of local competition, rights-of-way management by local governments was basically a non-issue for telecommunications companies. However, the authorization of local competition has apparently changed the way local governments view their police powers and rights-of-way management issues.

23. Beginning in 1997, telecommunications companies in Florida began seeing a flood of activity in this area and have been forced to spend significant time and money fighting attempts by local governments to exceed their authority under state and federal law. Florida's statutory

rights-of-way management standards were amended in 1998 to clarify the powers of local governments under state law. Those amendments included provisions that preclude cities from imposing unauthorized taxes, fees or other charges for the right to operate within the city; prohibit cities from soliciting or requiring in-kind compensation in lieu of any fees allowed under the guidelines; prevent local government entities from using their authority over the placement of facilities in rights-of-way as a basis for asserting or exercising general regulatory control over a telecommunications company; and limit the ability of municipalities to require additional consent to continue lawful occupation of the rights-of-ways.

24. These amendments have helped clarify the power of local governments over telecommunications companies and their use of public rights-of-ways; however, telecommunications companies continue to face local governments that seek to exercise more and more authority in this area. When confronted with the limitations on their authority in state law, some local governments point to Section 253(c) of the 1996 Act as a grant of authority to exercise regulatory powers beyond those available under Florida law. Many local governments continue to prepare ordinances that reflect a "let's test the limits of the law" mentality. This approach serves to increase the cost of doing business for telecommunications companies and can serve as a barrier to entry for some carriers.

25. The FCC can help telecommunications companies, local governments and the public by reiterating that Section 253(c) does not grant local governments any authority they do not already have under state law, and that Section 253(c) was intended to ensure that local governments exercise the authority given to them under state law in a non-discriminatory and

competitively neutral manner. The FCC should also issue a statement indicating that excessive application fees and unnecessarily time consuming application processes constitute barriers to entry and are illegal under the 1996 Act. Finally, to the extent the FCC finds that performance and construction bonds are necessary or appropriate for local governments, the FCC should clearly state that the amount of such bonds should be limited to the amounts necessary to repair damage to rights-of-way or to secure performance under the applicable ordinance and no more. These actions by the FCC would promote the development of competitive markets by further defining the rules applicable to telecommunications companies and local governments.

DATED this 12th day of October, 1999.

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